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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KENDALL J., a Person Coming
Under the Juvenile Court Law.

B187013

(Los Angeles County
Super. Ct. No. JJ09132)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENDALL J.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Robert L. Ambrose, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Victoria B. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Kendall J. appeals from a disposition order committing him to the California Youth Authority (CYA)¹ for a maximum period of physical confinement of five years eight months. He contends the juvenile court failed to exercise its discretion in setting the maximum period of physical confinement pursuant to Welfare and Institutions Code section 731, subdivision (b).² We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 28, 2001 Kendall J. was declared a ward of the juvenile court and ordered into camp community placement with a maximum period of physical confinement of six months for committing misdemeanor battery (§ 602; Pen. Code, §§ 242, 243). On July 15, 2003, following the filing of a new section 602 petition, Kendall J. was found to have committed attempted first degree burglary (Pen. Code, §§ 459, 664), continued as a ward of the court and again sent to camp community placement. The juvenile court calculated the maximum term of physical confinement as three years two months. On March 5, 2004, as part of a negotiated plea in response to yet another section 602 petition, Kendall J. admitted he had threatened a public officer and had committed battery on a school employee (Pen. Code, §§ 71, 243.6). The court calculated a non-aggregated maximum term of confinement of three years four months and ordered Kendall J. into a long-term camp program. After a fourth section 602 petition was sustained, this one alleging second degree robbery (Pen. Code, § 211), Kendall J. was committed to CYA on September 30, 2005 for a maximum term of physical confinement not to exceed five years eight months.

¹ On July 1, 2005 the CYA became the California Department of Corrections and Rehabilitation, Division of Juvenile Justice. (Gov. Code, §§ 12828, subd. (a), 12838.3.) For the sake of clarity and consistency, throughout this opinion we refer to Kendall J.'s commitment to the CYA and use the current statutory language, "Department of the Youth Authority."

² Statutory references are to the Welfare & Institutions Code unless otherwise indicated.

CONTENTION

Kendall J. contends the matter must be remanded for a new disposition hearing because the juvenile court failed to exercise its discretion under section 731, subdivision (b), to set a maximum period of physical confinement less than the maximum statutory term applicable to adults.

DISCUSSION

As amended effective January 1, 2004, section 731, subdivision (b), provides a minor may not be held in physical confinement at CYA for a period longer than the maximum period of imprisonment to which an adult convicted of the minor's offenses would be subjected *or* for a period longer than the "maximum term of physical confinement set by the court based upon the facts and circumstances" of the minor's offenses.³ The courts of appeal that have addressed the effect of the 2004 amendment agree under section 731, subdivision (b), the juvenile court has an affirmative duty to evaluate the circumstances of the offender and the case before it and the discretion to set a maximum commitment in CYA cases at less than the adult statutory maximum if warranted by those facts. (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1185; *In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1533, 1543; *In re Alex N.* (2005) 132 Cal.App.4th 18, 25-26.) Prior to the 2004 amendment, the juvenile court's task in fixing a maximum period of confinement was largely one of computation under the sentencing laws for adult offenders, with the court's discretion limited to declaring a "wobbler"

³ Section 731, subdivision (b), provides: "A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section. This section does not limit the power of the Youth Authority Board to retain the minor on parole status for the period permitted by Section 1769."

offense to be a misdemeanor or a felony (§ 702) and to deciding whether to aggregate terms when there were multiple counts or, as here, multiple section 602 petitions. (§ 726, subd. (c); see *Carlos E.*, at p. 1537.) Following the 2004 amendment, when committing a minor to CYA, the juvenile court must also consider the facts and circumstances of the matter before it in setting a maximum term of confinement that may, as a result, be less than the adult maximum term.

The juvenile court's comments during Kendall J.'s contested disposition hearing demonstrate the court was aware of its discretion under section 731, subdivision (b), and properly exercised its discretion in committing Kendall J. to CYA for a term shorter than the statutory maximum. The court reviewed the facts and circumstances underlying the fourth petition, as well as Kendall J.'s criminal history and performance on probation. The court explained, despite less restrictive placements, Kendall J. had continued to engage in criminal activity of increasing severity and to violate probation, rejecting "any efforts to help him." The court concluded Kendall J. would benefit from commitment to CYA and computed the aggregated maximum term of physical confinement as six years six months⁴ with 898 days (nearly two and one-half years) of credit from prior commitments.

Defense counsel specifically requested that the court exercise its discretion under section 731, subdivision (b), and use the lower term for second degree robbery in setting the maximum term of physical confinement. When the court refused, defense counsel

⁴ The court calculated the aggregated maximum term of physical confinement using the upper five-year term for robbery and adding eight months for attempted first degree burglary (one-third the two-year middle term), an additional eight months total for threatening a public officer and battery on a school employee (one-third the one-year term for each misdemeanor offense), plus two months for misdemeanor battery (one-third the six-month term). (Pen. Code, § 1170.1, subd. (a) [subordinate term for felony offense is one-third the middle term prescribed for the offense]; *In re Eric J.* (1979) 25 Cal.3d. 522, 536-538 [notwithstanding language of Pen. Code, § 1170.1, which refers only to felony offenses, in calculating maximum term of physical confinement for minor, subordinate misdemeanor terms are calculated as one-third of the maximum term for the offense].)

then urged the court to calculate the maximum term of physical confinement using the three-year upper term for attempted first degree burglary as the principal term, plus one year for second degree robbery (one-third the three-year middle term) with all the misdemeanors terms to run concurrently to the two felonies. The court agreed to reduce the maximum term of physical confinement by imposing all the misdemeanor terms concurrently to the two felonies, as requested by defense counsel, but used the robbery offense as the principal term (with an upper term of five years) and the attempted robbery as the subordinate term (one-third the middle term of two years), resulting in a maximum term of physical confinement of five years eight months -- 10 months less than the potential aggregated maximum term originally calculated by the court.⁵ The court expressly rejected any further reduction in setting the maximum term of confinement because, with Kendall J.'s 898 days of credit, he would be released from CYA before benefiting from meaningful treatment and rehabilitation: "I'm not going to send somebody there for one year"

In sum, the juvenile court in fact exercised its discretion under section 731, subdivision (a), to adjust the maximum term of physical confinement to the facts and circumstances of the case before it. In setting Kendall J.'s maximum term of physical confinement at five years eight months, there was no abuse of that discretion.

⁵

The People correctly point to two minor errors in the court's disposition order. First, the court incorrectly concluded the offense of threatening a public officer, sustained in the third petition, had been declared a misdemeanor; in fact, at disposition on the third petition, the juvenile court had found the offense to be a felony. Second, the court erroneously calculated the misdemeanor offenses at one-third of the maximum term, a reduction required only for subordinate consecutive terms, even though the court imposed those terms to run concurrently with the two felonies. As the People acknowledge, those errors are harmless because the maximum term of physical confinement remains five years eight months whatever the length of the concurrent terms.

DISPOSITION

The juvenile court's disposition order is affirmed.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

ZELON, J.